No. 95-701

Supreme Court, U.S.
FILED
NOV 3 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ALAN WEIL, Executive Director, Colorado Department of Health Care Policy and Financing, in his official capacity,

Petitioner,

—vs.—

WARREN M. HERN, M.D.; GRAND JUNCTION WOMEN'S CLINIC; PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, INC.; and MAYFAIR WOMEN'S CENTER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

HOWARD HOLME
Fairfield and Woods, P.C.
One Norwest Center
Suite 2400
1700 Lincoln Street
Denver, Colorado 80203-4524
(303) 830-2400
Attorneys for Respondent Planned Parenthood of the Rocky Mountains, Inc.

EVE C. GARTNER
(Counsel of Record)
KATHRYN KOLBERT
JANET CREPPS
The Center for Reproductive Law & Policy
120 Wall Street, 18th Floor
New York, New York 10005
(212) 514-5534

DANIEL M. REILLY
McKenna & Cuneo
Suite 4800
370 Seventeenth Street
Denver, Colorado 80202
(303) 634-4000
Attorneys for Respondents

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, as the six federal courts of appeal to reach this issue have uniformly held, states that participate in the federal Medicaid program must cover all medically necessary abortions for Medicaid-eligible women for which federal funding is not proscribed.

PARTIES TO THE PROCEEDING

Respondents are Warren M. Hern, M.D., Grand Junction Women's Clinic, Planned Parenthood of the Rocky Mountains, Inc. and Mayfair Women's Center, on behalf of themselves and their patients.

Warren M. Hern, M.D. is an individual. Utah Women's Clinic, Inc. is a corporation doing business as Grand Junction Women's Clinic. Planned Parenthood of the Rocky Mountains, Inc. is a corporation with no subsidiary or parent corporations. Mayfair Women's Center is a corporation with no subsidiary or parent corporations.

Petitioner is Alan Weil, Executive Director, Colorado Department of Health Care Policy and Financing. Defendant-appellant below was Karen Beye, Executive Director of the Colorado Department of Social Services.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

ADDITIONAL PROVISIONS AT ISSUE IN THIS CASE 1

COUNTERSTATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 6

I. THE LOWER FEDERAL COURTS HAVE UNIFORMLY AGREED THAT STATE MEDICAID PROGRAMS MUST COVER ABORTIONS FOR WHICH FEDERAL FUNDING IS NOT PROSCRIBED 7

II. THE LOWER COURT'S DECISION IS CONSISTENT WITH THE STRUCTURE OF THE FEDERAL MEDICAID ACT, THIS COURT'S DECISION IN *HARRIS v. MCRAE*, AND THE ADMINISTRATIVE AGENCY'S INTERPRETATION 10

A. The Structure of the Medicaid Act and *Harris v. McRae* Support the Result Reached by the Lower Court 10

B. HCFA's Directive to State Medicaid Directors Supports the Lower Court's Decision 15

C. Because the Challenged Provisions Directly Conflict with Federal Law, the Supremacy Clause Requires That They Be Enjoined 17

III. THE LOWER COURT'S DECISION IS CONSISTENT WITH *PENNHURST* AND *SOUTH DAKOTA v. DOLE* 17

CONCLUSION 20

TABLE OF AUTHORITIES

Cases: **Page:**

Allen v. Mansour, 681 F. Supp. 1232 (E.D. Mich. 1986), *appeal dismissed and order vacated as moot*, 1991 U.S. App. LEXIS 4710 (6th Cir. 1991) 11

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 16

Coe v. Hooker, 406 F. Supp. 1072 (D.N.H. 1976) 12

Dodge v. Department of Social Services, 657 P.2d 969 (Colo. Ct. App. 1982) 12

Doe v. Bolton, 410 U.S. 179 (1973) 16

Doe v. Busbee, 481 F. Supp. 46 (N.D. Ga. 1979) 12

Elizabeth Blackwell Health Center for Women v. Knoll, 61 F.3d 170 (3rd Cir. 1995), *reh'g en banc denied*, No. 94-1954 (3d Cir. Aug. 24, 1995), *aff'g* No. 94-CV-0169, 1994 U.S. Dist. LEXIS 13295 (E.D. Pa. Sept. 15, 1994) 8

Emma G. v. Edwards, 434 F. Supp. 1048 (E.D. La. 1977) 12

Fargo Women's Health Org. Inc. v. Wessman, No. A3-94-36 (D. N.D. Mar. 15, 1995), *stay pending appeal denied*, No. 95-1920NDF (8th Cir. June 12, 1995) 8

Fullilove v. Klutznick, 448 U.S. 448 (1980) 19

Harris v. McRae, 448 U.S. 297 (1980) . . . . . *passim*

Hern v. Beye, 57 F.3d 906 (10th Cir. 1995) 1

Hodgson v. Board of County Comm'rs, County of Hennepin, 614 F.2d 601 (8th Cir. 1980) 8, 12, 18

Hope v. Childers, No. 3:95CV-518-S (W.D. Ky. July 20, 1995) 9

Hope Medical Group for Women v. Edwards, 63 F.3d 418 (5th Cir. 1995), *reh'g denied*, No. 94-30445 (5th Cir. Oct. 17, 1995), *aff'g* 860 F. Supp. 1149 (E.D. La. 1994), *stay denied*, 115 S. Ct. 1 (1994) (Scalia, J.) 8, 9

Jeannette R. v. Ellery, No. BDV-94-811 (Mont. Dist. Ct. June 1, 1994) 9

Little Rock Family Planning Services, P.A. v. Dalton, 60 F.3d 497 (8th Cir. 1995), *reh'g denied*, No. 94-2885EALR (8th Cir. Sept. 22, 1995), *reh'g en banc denied*, No. 94-3903NEL (8th Cir. Sept. 22, 1995), *aff'g* 860 F. Supp. 609 (E.D. Ark. 1994) & *Orr v. Nelson*, 874 F. Supp. 998 (D. Neb. 1995) 8, 9

National Railroad Passenger Corp. v. Boston & Maine Corp., 530 U.S. 407 (1992) 16

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) 7, 17, 18

Pinneke v. Preisser, 623 F.2d 546 (8th Cir. 1980) 11

Planned Parenthood Affiliates of Michigan v. Engler, 860 F. Supp. 406 (W.D. Mich. 1994), *stay pending appeal denied*, Nos. 94-1913 & 94-2097 (6th Cir. Jan. 20, 1995), *appeal and cross-appeal argued*, Nos. 94-1913 & 94-2097 (6th Cir. Oct. 13, 1995) 8

Planned Parenthood of Missoula Inc. v. Blouke, 858 F. Supp. 137 (D. Mont. 1994) 9

Planned Parenthood v. Wright, No. 94 C 6886, 1994 WL 750638 (N.D. Ill. Dec. 6, 1994) 8

Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979) 8, 9, 18

Reproductive Health Services v. Freeman, 614 F.2d 585 (8th Cir.), *vacated on other grounds*, 449 U.S. 809 (1980) 8, 18

Roe v. Casey, 623 F.2d 829 (3d Cir. 1980) 8, 18

South Dakota v. Dole, 483 U.S. 203 (1987) 7, 17, 18, 19

Stangler v. Shalala, No. 94-4221-CV-C-5 (W.D. Mo. Dec. 28, 1994) 8

Suter v. Artist M., 503 U.S. 347 (1993) 18

Utah Women's Clinic, Inc. v. Graham, 892 F. Supp. 1379 (D. Utah 1995) 8

Van Lare v. Hurley, 421 U.S. 338 (1975) 17

Weaver v. Reagen, 886 F.2d 194 (8th Cir. 1989) 11

Wilder v. Virginia Hospital Ass'n, 496 U.S. 498 (1990) 10

Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979), *cert. denied*, 448 U.S. 907 (1980) 8, 9, 18

Constitutional Provisions, Statutes, and Regulations:

United States Constitution, Article VI, clause 2 . . . . . 1, 4, 17

42 C.F.R. § 441.202 (1994) 16

42 C.F.R. § 441.203 (1994) 16

42 C.F.R. § 441.206 (1994) 16

42 U.S.C. §§ 1396-1396u (1994) 10

42 U.S.C. § 1396a(a)(10)(A) (1994) 2, 11, 18

42 U.S.C. §§ 1396d(a)(1)-(5) (1994) 2, 11

42 U.S.C. § 1396d(a) (1994) 12

Pub. L. No. 96-369, § 101(c), 94 Stat. 1352 (1980) 13

Pub. L. No. 96-536, § 109, 94 Stat. 3166 (1980) 13

Pub. L. No. 97-12, §§ 401-02, 95 Stat. 14 (1981) 13

Pub. L. No. 97-377, § 204, 96 Stat. 1830 (1982) 13

Pub. L. No. 103-112, § 509, 107 Stat. 1082 (1993) 3

Pub. L. No. 103-333, § 509, 108 Stat. 2539 (1994) 1-2, 3, 17

10 Colo. Code Regs. § 2505-10 (1995) 3, 13

Colorado Constitution, Article V, section 50 . . . . . 3, 13

Colo. Rev. Stat. § 26-4-105.5 (1989 and Supp. 1995) 3, 13

Colo. Rev. Stat. § 26-4-512 (1989 and Supp. 1995) 3, 13

Colo. Rev. Stat. §26-15-104.5 (1989 and Supp. 1995) 3, 13

Department of Social Services § 8.733 . . . . . 3, 13

Other:

Sup. Ct. R. 10.1(a) 6

Sup. Ct. R. 10.1(c) 7

Fed. R. Civ. P. 65(a)(2) 4

Jerry Gray, *The 104th Congress: Spending Cuts*, N.Y. Times, March 3, 1995, at A-19 13

David E. Rosenbaum, *House Committee Supports Tax Cut*, N.Y. Times, March 15, 1995, at A-1 13

Respondents Warren M. Hern, M.D., *et al.* oppose the Petition for Writ of Certiorari, docketed on October 31, 1995, by the Executive Director of the Colorado Department of Health Care Policy and Financing ("petitioner"). Petitioner seeks review of a decision of the United States Court of Appeals for the Tenth Circuit, *Hern v. Beye*, 57 F.3d 906 (10th Cir. 1995), holding that, under the Supremacy Clause of the U.S. Constitution, Colorado's medical assistance program must cover abortions for women who become pregnant as a result of acts of rape or incest for so long as Colorado participates in the federal Medicaid program. *See* B-1.[1]

ADDITIONAL PROVISIONS AT ISSUE IN THIS CASE

Article VI, clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-333, § 509, 108 Stat. 2539, 2573 (1994),

---

[1]Citations to the Appendix to the Petition for Certiorari are in the form "A-__"; those to the Appendix to this Brief are in the form "__a."

provides:

> None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.

42 U.S.C. § 1396a(a)(10)(A) (1994) provides:

> A State plan for medical assistance must provide for making medical assistance available, including at least the care and services listed in paragraphs (1) through (5), (17) and (21) of section 1396d(a) of this title . . . .

42 U.S.C. §§ 1396d(a)(1)-(5) (1994) provide in relevant part:

> (1) inpatient hospital services (other than services in an institution for mental diseases); (2)(A) outpatient hospital services . . . ; (3) other laboratory and X-ray services; (4)(A) nursing facility services . . . ; (B) early and periodic screening, diagnostic and treatment services . . . for individuals . . . under the age of 21; (C) family planning services . . . ; (5)(A) physicians' services furnished by a physician . . . .

COUNTERSTATEMENT OF THE CASE

On October 21, 1993, President Clinton signed into law the fiscal year 1994 appropriations bill for the Departments of Labor, Health and Human Services and Education, which includes the 1994 version of the "Hyde Amendment," an annual rider prohibiting federal reimbursement for abortions except in a narrow range of circumstances. *See* Pub. L. No. 103-112, § 509, 107 Stat. 1082, 1113 (1993). The 1994 Hyde Amendment, which appropriated federal funds for abortions necessary to save the life of the pregnant woman or when the pregnancy resulted from an act of rape or incest, marked a significant expansion in federal funding for abortion services. Between 1981 and 1993, the annual Hyde Amendment appropriated federal Medicaid funds for abortion services only when the pregnant woman's life was at risk. Despite vigorous attempts in Congress to amend it,[2] the 1995 Hyde Amendment is identical to the 1994 Hyde Amendment. *See* Pub. L. No. 103-333, § 509, 108 Stat. 2539, 2573 (1994).

This case was commenced on November 8, 1993, seeking declaratory and injunctive relief barring enforcement of Article V, section 50 of the Colorado Constitution, its implementing statutes and regulations,[3] and the provisions of the Colorado state plan that relate to abortion funding (together, the "challenged provisions"), for so long as Colorado receives federal Medicaid funding. The challenged provisions would deny Colorado Medicaid recipients coverage for abortions except when necessary to

---

[2]*See* note 7, *infra.*

[3]Colo. Rev. Stats. §§ 26-4-105.5, 26-4-512, 26-15-104.5 (1989 and Supp. 1995), Department of Social Services § 8.733, 10 Colo. Code Regs. § 2505-10 (1995).

save a pregnant woman's life. Respondents claimed that, pursuant to the Supremacy Clause of the United States Constitution, the challenged provisions must be enjoined because they directly conflict with federal law which, as of the outset of the 1994 federal fiscal year, mandates Medicaid coverage for abortions for rape and incest victims.

On December 14, 1993, after petitioner had moved to dismiss the complaint, respondents cross-moved for summary judgment. On April 28, 1994, while respondents' motion for summary judgment was pending, respondents moved for a temporary restraining order and/or preliminary injunction, seeking a court order that a Colorado Medicaid recipient, Jane Courage, who was 11 weeks pregnant as a result of a rape that was reported to the police, was entitled to Medicaid coverage for the abortion she sought. On May 5, 1994, the United States District Court for the District of Colorado (Nottingham, J.) held a preliminary injunction hearing at which respondents presented testimony from three witnesses regarding the irreparable injury caused by the challenged provisions to low-income women who become pregnant from rape or incest. At the conclusion of the evidence, the district court, with the agreement of all parties, consolidated the preliminary injunction motion with the trial on the merits, pursuant to Fed. R. Civ. P. 65(a)(2).

The district court granted respondents' motion for summary judgment, ruling that the Colorado Medicaid program must cover all abortions for which federal reimbursement is provided, and that Colorado law prevented such coverage. He stated:

> In 1984, the People of the State of Colorado enacted a provision amending the Colorado Constitution in a way that is narrower than the Hyde Amendment. The

> circuit courts' decisions that interpret the Social Security Act or the Medicaid Act and the Hyde Amendment are clear, and I have heard no persuasive basis for distinguishing this case from those cases . . . .
>
> I counted four circuit court decisions . . . , and I'm just going to cite them, I'm not going to discuss them because they contain, in themselves, the reasoning which I adopt. (Citations omitted.)

4a.[4]

Defendant sought a stay pending appeal from the district court, which plaintiffs opposed. The district court denied the motion from the bench, holding:

> [t]he testimony here concerning the injury which will occur to pregnant women who are pregnant as a result of rape or incest . . . is compelling to the effect that it endangers their health, in some cases, it endangers their life, and I do not weigh that very lightly in the balance, even the balance [as stated by defendant's counsel that the state of Colorado will have to withdraw from the Medicaid program].

---

[4]On May 12, 1994, the district court issued a written Order Granting Final Injunctive Relief, formalizing the Court's May 5 ruling. *See* C-1.

9a.[5]

On May 9, 1994, petitioner filed a Notice of Appeal of the final judgment of the district court entered from the bench on May 5, 1994. On June 8, 1995, the United States Court of Appeals for the Tenth Circuit unanimously affirmed the district court. *See* B-1. Colorado's petition for rehearing and suggestion for rehearing *en banc* was denied on July 19, 1995. *See* A-1.

REASONS FOR DENYING THE WRIT

Petitioner's request for a writ of certiorari must be denied because he has failed to establish any of the factors that weigh in favor of granting the petition. Petitioner does not claim that the decision of the Court of Appeals for the Tenth Circuit is in "conflict with the decision of another United States court of appeals on the same matter." Sup. Ct. R. 10.1(a). Nor could he do so. Indeed, the decision of the court below is in complete harmony with the decisions of the Courts of Appeals for the First, Third, Fifth, Seventh and Eighth Circuits, as well as seven recent decisions of United States district courts that have not been appealed or in which appellate rulings have not yet been rendered. On this issue, which has been litigated extensively in the federal courts over the last fifteen years, there is no standing contrary precedent.

Petitioner argues that his petition should be granted because the court below "decided an important question of federal law which has not been, but should be, settled by

---

[5]The Court of Appeals for the Tenth Circuit also denied petitioner's motion for a stay of the district court's injunction pending appeal or, in the alternative, a modification of that injunction. *Hern v. Beye*, No. 94-1205 (10th Cir. May 31, 1994).

this Court," Sup. Ct. R. 10.1(c), and "decided a federal question in a way that conflicts with applicable decisions of this Court." *Id.* Petitioner is incorrect on both counts. First, petitioner's misinterprets this Court's ruling in *Harris v. McRae*, 448 U.S. 297 (1980), which strongly supports the result reached by the lower court. Second, petitioner purports to find a conflict between the lower court's ruling and two inapposite decisions of this Court – *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981) and *South Dakota v. Dole*, 483 U.S. 203 (1987). Neither *Pennhurst* nor *South Dakota v. Dole* have anything do to with state obligations under the federal Medicaid program or with abortion. Rather, petitioner invokes these cases for the generic proposition that congressional conditions on a state's receipt of federal funds must be unambiguous. What petitioner fails to note, however, is that for over fifteen years federal law has, in fact, been unambiguous that state Medicaid programs must cover all medically necessary abortion services for which federal funding is not proscribed.

Moreover, because the lower federal courts have reached a uniform result in the numerous cases addressing this precise issue, and this Court has already denied a writ of certiorari in two of those cases, there is no compelling reason for this Court to use its limited resources to review this matter. The petition therefore must be denied.

I. THE LOWER FEDERAL COURTS HAVE UNIFORMLY AGREED THAT STATE MEDICAID PROGRAMS MUST COVER ABORTIONS FOR WHICH FEDERAL FUNDING IS NOT PROSCRIBED

The lower court's decision ordering the Colorado medical assistance program (so long as it participates in the

federal Medicaid program) to cover abortions for rape and incest victims for so long as federal funding is not proscribed for such procedures, is in complete accord with every standing decision of the federal appellate and district courts to decide this question. *See Hope Medical Group for Women v. Edwards*, 63 F.3d 418, 428 (5th Cir. 1995), *reh'g denied*, No. 94-30445 (5th Cir. Oct. 17, 1995), *aff'g* 860 F. Supp. 1149 (E.D. La. 1994), *stay denied*, 115 S. Ct. 1 (1994) (Scalia, J.); *Little Rock Family Planning Services, P.A. v. Dalton*, 60 F.3d 497, 502-03 (8th Cir. 1995), *reh'g denied*, No. 94-2885EALR (8th Cir. Sept. 22, 1995), *reh'g en banc denied*, No. 94-3903NEL (8th Cir. Sept. 22, 1995), *aff'g* 860 F. Supp. 609 (E.D. Ark. 1994) & *Orr v. Nelson*, 874 F. Supp. 998 (D. Neb. 1995); *Elizabeth Blackwell Health Center for Women v. Knoll*, 61 F.3d 170, 177 (3d Cir. 1995), *reh'g en banc denied*, No. 94-1954 (3d Cir. Aug. 24, 1995), *aff'g* No. 94-CV-0169, 1994 U.S. Dist. LEXIS 13295 (E.D. Pa. Sept. 15, 1994); *Roe v. Casey*, 623 F.2d 829, 836-37 (3d Cir. 1980); *Reproductive Health Services v. Freeman*, 614 F.2d 585, 596 (8th Cir.), *vacated on other grounds*, 449 U.S. 809 (1980); *Zbaraz v. Quern*, 596 F.2d 196, 199 n.7 (7th Cir. 1979), *cert. denied*, 448 U.S. 907 (1980); *Hodgson v. Board of County Comm'rs, County of Hennepin*, 614 F.2d 601, 605 (8th Cir. 1980); *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 134 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979); *Utah Women's Clinic, Inc. v. Graham*, 892 F. Supp. 1379, 1384 (D. Utah 1995); *Fargo Women's Health Org. Inc. v. Wessman*, No. A3-94-36, slip op. at 25 (D. N.D. Mar. 15, 1995), *stay pending appeal denied*, No. 95-1920NDF (8th Cir. June 12, 1995); *Stangler v. Shalala*, No. 94-4221-CV-C-5, slip op. at 11 (W.D. Mo. Dec. 28, 1994); *Planned Parenthood v. Wright*, No. 94 C 6886, 1994 WL 750638, at *3 (N.D. Ill. Dec. 6, 1994); *Planned Parenthood Affiliates of Michigan v. Engler*, 860 F. Supp. 406, 410 (W.D. Mich. 1994), *stay pending appeal denied*, Nos. 94-1913 & 94-2097 (6th Cir. Jan. 20, 1995),

appeal and cross-appeal argued, Nos. 94-1913 & 94-2097 (6th Cir. Oct. 13, 1995); *Planned Parenthood of Missoula Inc. v. Blouke*, 858 F. Supp. 137, 142 (D. Mont. 1994); *see also Hope v. Childers*, No. 3:95CV-518-S (W.D. Ky. July 20, 1995) (order granting preliminary injunction).[6]

In two of these cases -- *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979), *cert. denied*, 448 U.S. 907 (1980), and *Preterm, Inc. v. Dukakis*, 591 F.2d 121 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979) -- this Court denied petitions for certiorari. In view of the extensive, and uniformly decided, body of case law handed down since those petitions were denied, there is even less reason to review the lower court decision at issue here than the ones at issue in *Zbaraz* and *Preterm*. Indeed, in denying an application for a stay pending appeal in *Hope Medical Group for Women v. Edwards*, Justice Scalia recognized that:

> [t]he Courts of Appeals to address th[e] question [of whether Title XIX requires States participating in the Medicaid program to fund abortions unless federal funding for those procedures is proscribed by the Hyde Amendment] have uniformly supported that premise . . . . We have already denied certiorari in two of those cases, and it is in my view a certainty that four Justices will not be found to vote for certiorari on the Title XIX question unless

---

[6]One state court has also reached this result. *See Jeanette R. v. Ellery*, No. BDV-94-811 (Mont. Dist. Ct. June 1, 1994) (annexed as an Appendix to the district court's opinion in *Little Rock Family Planning Services, P.A.*, 860 F. Supp. at 628) (preliminarily enjoining Montana from denying Medicaid coverage for abortions for rape and incest victims).

and until a conflict in the Circuits appears.

115 S. Ct. at 2 (citations omitted). No conflicts in the Circuits having appeared, this Court should follow Justice Scalia's well-grounded reasoning and deny this petition.

II. THE LOWER COURT'S DECISION IS CONSISTENT WITH THE STRUCTURE OF THE FEDERAL MEDICAID ACT, THIS COURT'S DECISION IN *HARRIS v. MCRAE*, AND THE ADMINISTRATIVE AGENCY'S INTERPRETATION

Not only have the lower federal courts been uniform in their treatment of the question presented for review, the result they have reached is supported by the structure of the federal Medicaid Act, this Court's decision in *Harris v. McRae*, and the guidance of the Health Care Financing Administration ("HCFA") of the United States Department of Health and Human Services ("HHS"), which is charged with overseeing the federal Medicaid program.

A. The Structure of the Medicaid Act and *Harris v. McRae* Support the Result Reached by the Lower Court

The federal Medicaid program (established pursuant to Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396u (1994)) is a federal-state cooperative program that enables participating states, with the aid of federal funds, to provide medical services to needy individuals. "Although participation in [Medicaid] is voluntary, participating States must comply with certain requirements imposed by the Act and regulations promulgated by the Secretary of Health and Human Services." *Wilder v. Virginia Hospital Ass'n*, 496

U.S. 498, 502 (1990).

Under Title XIX, certain categories of medical care are "mandatory," and must be provided by every state Medicaid program. *See* 42 U.S.C. § 1396a(a)(10)(A) ("A State plan for medical assistance must provide for making medical assistance available, including at least the care and services listed in paragraphs (1) through (5) . . . of section 1396d(a) of this title."). The mandatory categories of care include:

> (1) inpatient hospital services (other than services in an institution for mental diseases); (2)(A) outpatient hospital services . . . ; (3) other laboratory and X-ray services; (4)(A) nursing facility services . . . ; (B) early and periodic screening, diagnostic and treatment services . . . for individuals . . . under the age of 21; (C) family planning services . . . ; (5)(A) physicians' services furnished by a physician . . . .

42 U.S.C. §§ 1396d(a)(1)-(5). A state plan must cover medical services that fall within the mandatory categories of care which an individual's physician certifies as "medically necessary." *See Weaver v. Reagen*, 886 F.2d 194, 200 (8th Cir. 1989) (Medicaid must cover medically necessary AZT treatments); *Pinneke v. Preisser*, 623 F.2d 546, 550 (8th Cir. 1980) (Medicaid must cover medically necessary sex reassignment surgery); *Allen v. Mansour*, 681 F. Supp. 1232, 1237-38 (E.D. Mich. 1986) (Medicaid must cover medically necessary liver transplant surgery), *appeal dismissed and order vacated as moot*, 1991 U.S. App. LEXIS 4710 (6th Cir. Mar. 19, 1991).

Because abortion falls within several of the categories

of mandatory covered services identified in 42 U.S.C. § 1396d(a) -- "family planning services," "physicians' services," "outpatient hospital services," "inpatient hospital services" -- between 1973 and 1976, state Medicaid programs were required to cover medically necessary abortions. As the Court of Appeals for the Eighth Circuit held in *Hodgson*, "[w]e think it plain that [Medicaid's mandatory services] include medical procedures to induce abortions." 614 F.2d at 607. *See also Doe v. Busbee*, 481 F. Supp. 46, 49 (N.D. Ga. 1979) ("[a]bortion is a medical service which falls within one or more of the five categories of medical service which must, as a minimum, be provided under a state's plan for medical assistance"); *Emma G. v. Edwards*, 434 F. Supp. 1048, 1050 (E.D. La. 1977) (state of Louisiana stipulated that medically necessary abortions were covered under Title XIX); *Coe v. Hooker*, 406 F. Supp. 1072, 1082-83, 1086 (D.N.H. 1976) (medically necessary abortions are a covered service under Medicaid); *Dodge v. Department of Social Services*, 657 P.2d 969, 974 (Colo. Ct. App. 1982) ("abortion is a medical procedure . . . . When performed by physicians, this medical procedure necessarily involves physician services. It may also involve inpatient or outpatient hospital services, or both, as well as other statutorily defined categories of authorized medical services in some circumstances").

In 1976, Congress passed what is commonly called the Hyde Amendment, which prohibits federal reimbursement for abortions except in the narrow circumstances that Congress deems to be medically necessary. Each year since 1976, Congress has added a "Hyde Amendment" to annual appropriations bills for the U.S. Department of Health and

Human Services.[7] The circumstances in which federal funds have been appropriated for low-income women's abortions has varied. Between fiscal years 1982 and 1993, the Hyde Amendment limited federally funded abortions to situations where the life of the pregnant woman would be threatened by carrying the pregnancy to term.[8]

---

[7]The State of Colorado did not choose to restrict coverage of abortion services under its state Medicaid plan until 1984, when Article V, section 50 was added to the Colorado Constitution after passage by initiative vote. The Colorado General Assembly subsequently passed Colo. Rev. Stats. §§ 26-4-105.5 and 26-4-512, implementing Article V, section 50 under the Colorado Medical Assistance Act, and § 26-15-104.5, implementing Article V, section 50 under the Reform Act for the Provision of Health Care for Medically Indigent, and the Department of Social Services adopted § 8.733, 10 Colo. Code Regs. 2505-10 (1995), detailing procedures to be followed when public funds are used for abortions. Prior to 1984, Colorado covered all medically necessary abortions in its Medicaid program using state funds.

[8]For several years the Hyde Amendment contained a proviso explicitly giving state Medicaid programs the option not to cover even those abortions for which federal funding was available. The provision stated: "Provided, however, That the several States are and shall remain free not to fund abortions to the extent that they in their sole discretion deem appropriate." *See* Pub. L. No. 96-369, § 101(c), 94 Stat. 1352, 1353 (1980); Pub. L. No. 96-536, § 109, 94 Stat. 3166, 3170 (1980); Pub. L. No. 97-12, §§ 401-02, 95 Stat. 14, 95-96 (1981); Pub. L. No. 97-377, § 204, 96 Stat. 1830, 1894 (1982). This "state-option" proviso to the Hyde Amendment has not been enacted since 1982, although it was proposed and rejected in 1995. *See* Jerry Gray, *The 104th Congress: Spending Cuts*, N.Y. Times, March 3, 1995, at A-19 (discussing amendment added by House Appropriations Committee to budget rescissions bill, which would have given states the option of not covering Medicaid abortions for rape and incest victims); David E. Rosenbaum, *House Committee Supports Tax Cut*, N.Y. Times, March 15, 1995, at A-1 (reporting that the "state option" Medicaid abortion provision had been eliminated from the rescissions bill).

In 1980, in *Harris v. McRae*, this Court upheld, against statutory and constitutional challenge, congressional restrictions on federal funding of abortion services for the poor. *McRae* directly supports the result reached by the lower court here. In challenging the Hyde Amendment, the plaintiffs in *McRae* argued that despite the withdrawal of federal funds for non-lifesaving abortions, state Medicaid programs continued to be obligated under Title XIX to cover all medically necessary abortions, even if they had to pay for the procedures entirely with state funds. *See McRae*, 448 U.S. at 307-08 ("[i]t is thus the appellees' view that the effect of the Hyde Amendment is to withhold federal reimbursement for certain medically necessary abortions, but not to relieve a participating State of its duty under Title XIX to provide for such abortions in its Medicaid plan"). This Court rejected that argument, holding that Congress "did not intend a participating State to assume a unilateral funding obligation for any health service in an approved Medicaid plan." *Id.*, at 309. It stated: "Title XIX does not require a participating State to pay for *those* medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment." *Id.*, at 311 (emphasis added).

The plain implication of this Court's holding in *McRae* is that Title XIX requires states to cover those medically necessary abortions for which the funding obligation is not "unilateral," 448 U.S. at 309, and for which federal reimbursement *is* available under the Hyde Amendment. In other words, to the extent that federal funding for medically necessary abortions is not proscribed by the Hyde Amendment, participating states are obligated to continue covering medically necessary abortions, as they did before

the Hyde Amendment was enacted.[9]

B. HCFA's Directive to State Medicaid Directors Supports the Lower Court's Decision

Concurring with this analysis, on December 28, 1993, the director of the Medicaid Bureau of HCFA advised state Medicaid directors that, effective October 1, 1993, all state medical assistance plans must cover abortions for which federal funds are appropriated under the current Hyde Amendment (the "HCFA Directive"). *See* 1b. In relevant part, the HCFA Directive provides:

> As with all other mandatory medical services for which Federal funding is available, States are required to cover abortions that are medically necessary. By definition, abortions that are necessary to save the life of the mother are medically necessary. In addition, Congress this year added abortions for pregnancies resulting from rape and incest to the category of medically necessary abortions for which funding is provided . . . . [W]e believe that this change in the text of the Hyde Amendment signifies Congressional intent that abortions of pregnancies resulting from rape or incest are medically necessary in light of both medical and psychological health factors. Therefore,

---

[9]Petitioner's request that this Court should grant the petition to decide the question left open in *McRae* regarding whether the Hyde Amendment substantively amends Title XIX must be rejected. As shown herein, the lower court's decision is legally correct regardless of whether the Hyde Amendment substantively amends Title XIX.

> abortions resulting from rape or incest should be considered to fall within the scope of services that are medically necessary.

2b.[10] HCFA's interpretation of participating states' obligations under the Hyde Amendment and Title XIX is entitled to substantial deference by this Court. *See National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992) ("[j]udicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well settled principle of federal law"); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (reasonable agency determination must be accorded "considerable weight").

The fact that outdated HHS regulations purport to limit federal Medicaid funding for abortions exclusively to when the pregnant woman's life is at risk, *see* 42 C.F.R. §§ 441.202, 441.203, 441.206 (1991), is irrelevant here. The 1987 HHS regulations cited by petitioner cannot take precedence over a duly enacted federal statute -- such as the current version of the Hyde Amendment -- which plainly allocates federal funds for abortions to terminate

---

[10]Contrary to petitioner's argument, respondents do not claim that every Medicaid-eligible woman or girl who is pregnant as a result of rape or incest has, as a matter of law, a medical need for an abortion. Rather, they claim that if a low-income woman's physician determines "in the light of all factors -- physical, emotional, psychological, familial, and the woman's age -- relevant to the well-being of the patient," *Doe v. Bolton*, 410 U.S. 179, 192 (1973), that an abortion to terminate a pregnancy resulting from rape or incest is in the interests of a patient's health and thus medically necessary, federal law requires that the procedure be covered by Medicaid. Moreover, it cannot be disputed that some rape and incest victims have a medical need to terminate the pregnancy. *See* 9a.

pregnancies resulting from rape or incest. *See* Pub. L. No. 103-333, § 509, 108 Stat. 2539, 2573 (1994).

C. Because the Challenged Provisions Directly Conflict with Federal Law, the Supremacy Clause Requires That They Be Enjoined

The Supremacy Clause, Article VI, clause 2 of the United States Constitution, requires invalidation of any state constitutional or statutory provision that conflicts with federal law. *See, e.g., Van Lare v. Hurley*, 421 U.S. 338, 346-47 (1975) (New York regulations reducing shelter allowance to AFDC recipients are invalid because they conflict with Title XIX and federal regulations). Because Title XIX and the 1994 and 1995 Hyde Amendments, when read together, mandate coverage of abortions for low-income rape and incest victims -- which the challenged provisions prohibit -- the Supremacy Clause requires invalidation of the challenged provisions; this is precisely what the lower court here held.

III. THE LOWER COURT'S DECISION IS CONSISTENT WITH *PENNHURST* AND *SOUTH DAKOTA v. DOLE*

Petitioner's attempt to find a conflict between the lower court's decision and this Court's decisions in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981) and *South Dakota v. Dole*, 483 U.S. 203 (1987), is unavailing. *Pennhurst* involved the rights of mentally retarded individuals under the federal Developmentally Disabled Assistance and Bill of Rights Act ("DDABRA"). In *Pennhurst*, this Court reversed the novel holding of the Court of Appeals for the Third Circuit that the "bill of rights" provision in the DDABRA created enforceable rights and obligations, in part because that provision did not

unambiguously create any enforceable rights. Here, there is no question that the Medicaid Act -- by its terms -- requires state Medicaid programs to cover medically necessary services that fall within the mandatory areas of care. *See* 42 U.S.C. § 1396a(a)(10)(A). There is also no question that private citizens have the right to enforce that mandate. *See, e.g.*, cases cited at 11, *supra*.[11] Also, unlike the claims of the plaintiffs in *Pennhurst*, the respondents here do not claim that Colorado must fund "newly declared individual rights . . . 'that Congress itself is unwilling to fund.'" *Pennhurst*, 451 U.S. at 22 (quoting *McRae*, 448 U.S. at 309). Rather, they claim that Colorado must comply with well-established and longstanding federal law by covering the very medical procedures for which Congress has appropriated federal funds.

Moreover, unlike the claims of the petitioner in *Pennhurst*, petitioner here cannot reasonably claim that he was unaware that the Hyde Amendment provides a floor for Medicaid coverage of abortion. By 1984, when the challenged provisions were adopted, several federal appellate courts had already decided that state Medicaid programs must fund abortions for which federal funding is not proscribed. *See Roe v. Casey; Reproductive Health Services; Hodgson; Zbaraz; Preterm.*

South Dakota v. Dole, which upheld a federal statute mandating that a percentage of otherwise allocable federal highway funds be withheld from states where the lawful drinking age is less than twenty-one years, is also consistent with the lower court's decision here. In that case, this Court held that "Congress may attach conditions on the

---

[11]For this reason, petitioner's reliance on *Suter v. Artist M.*, 503 U.S. 347 (1993), is entirely misplaced.

receipt of federal funds . . . 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" *Dole*, 483 U.S. at 206 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980)). That is precisely what has occurred here: to further the policy objective of ensuring that low-income rape and incest victims are not compelled by their poverty to bear unwanted children conceived in brutal crimes, Congress has conditioned participation in the federal Medicaid program on compliance with federal statutes, which currently require Medicaid coverage of abortions for rape and incest victims.

CONCLUSION

Although this Court has not squarely ruled on the issue presented here, there is no reason for it to use its limited resources to do so. The lower court's ruling is in harmony with every standing federal decision on this issue, is supported by this Court's prior related decision in *Harris v. McRae*, as well as by the federal Medicaid Act and the HCFA Directive, and is fully consistent with the decisions of this Court cited by petitioner. For the reasons stated herein, the petition for a writ of certiorari must be denied.

Dated: November 3, 1995

Respectfully submitted,

EVE C. GARTNER
(Counsel of Record)
KATHRYN KOLBERT
JANET CREPPS
The Center for Reproductive
Law & Policy
120 Wall Street - 18th Floor
New York, New York 10005
(212) 514-5534

DANIEL M. REILLY
McKenna & Cuneo
Suite 4800
370 Seventeenth Street
Denver, Colorado 80202
(303) 634-4000

Attorneys for all Respondents

HOWARD HOLME
Fairfield and Woods, P.C.
One Norwest Center
Suite 2400
1700 Lincoln Street
Denver, Colorado 80203-4524
(303) 830-2400

Attorneys for Respondent Planned Parenthood of the Rocky Mountains, Inc.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

WARREN M. HERN, M.D., et al.,	)	
Plaintiffs,	)	
vs .	)	93 N 2350
KAREN BEYE, et al.,	)	
Defendants.	)	

EXCERPTS OF
HEARING - PRELIMINARY INJUNCTION
PARTIAL TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE EDWARD W . NOTTINGHAM, U. S. District Judge for the District of Colorado, beginning at 9:00 a.m. on the 5th day of May, 1994, Courtroom C-203, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiffs:

Howard Holme, Esq.
Fairfield & Woods, P.C.
1700 Lincoln Street, #2400
Denver, Colorado 80203

Daniel M. Reilly, Esq .
McDermott, Hansen & Reilly
1890 Gaylord Street
Denver, Colorado 80206

Kathryn Kolbert, Esq.
Eve Gartner, Esq.
Center for Reproductive Law & Policy
120 Wall Street
New York, New York 10005

APPEARANCES: (Continued.)

For the Defendants:

Wade Scot Livingston, Esq.
Paul Farlay, Esq.
Attorney General's Office
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

PROCEEDINGS

(Whereupon, the following consists of a partial transcript of the proceedings held, as requested.)

THE COURT: All right, the matter is before the Court on a motion for a preliminary injunction, which with the agreement and consent of all parties, is being converted to a motion--or to a hearing on the merits of the case.

It seems to me the issue in this case is relatively narrow and relatively clear once I had a chance to focus on it and spend some time on it.

The issue has nothing to do with the wisdom of any particular rule of law. The issue is whether the federal statute prevails. And it's worth quoting the supremacy clause in light of the distinction that is alluded to in some of the State's papers concerning the distinction between a state constitutional provision and a state statutory provision.

The supremacy clause of the United States Constitution says, "The Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land, and the judges of every state shall be bound thereby, anything in the constitution or laws of any state to the contrary not withstanding."

So that's the issue; whether the state constitutional provision and the state statutory materials that are enacted pursuant to that constitutional provision can stand up in light of the requirements of the Medicaid Act and the Hyde Amendment.

. . .

Now I turn to the merits of the case. The two relevant federal statutes are Title 19 of the Social Security Act, commonly known as the Medicaid Act or Medicaid Program, and the most recent version of the Hyde Amendment which was enacted in

1993. The most recent version of the Hyde Amendment, which differs somewhat from some of the prior versions, says, "None of the funds appropriated under this Act, which was the Appropriations Act for the Department of Health and Human Services last year for fiscal year 1994, shall be expended for any abortion, except when it is made known to the federal entity or official to which funds are appropriated under this Act, that such procedure is necessary to save the life of the mother, or that the pregnancy is the result of an act of rape or incest."

In 1984, the People of the State of Colorado enacted a provision amending the Colorado Constitution in a way that is narrower than the Hyde Amendment. The circuit courts' decisions that interpret the Social Security Act or the Medicaid Act and the Hyde Amendment are clear, and I have heard no persuasive basis for distinguishing this case from those cases, or from -- or for saying that those cases were wrongly decided.

I counted four circuit court decisions rather than three that fell into the category, and I'm just going to cite them, I'm not going to discuss them because they contain, in themselves, the reasoning which I adopt. The First Circuit case is Preterm Incorporated versus Dukakis reported at 591 F.2d 121, a 1979 case. The Third Circuit case is Roe versus Casey reported at 623 F.2d 829. That is a 1980 case, and that one is as close on point as cases usually get. The Seventh Circuit case is Zbaraz versus Quern, 596 F.2d 196. That's a 1979 case. And also I rely on the Eighth Circuit's decision Hodgson versus Board of County Commissioners, County of Hennepen, 614 F.2d 601. That's a 1980 case.

Now, the defendants suggest that Harris versus McRay somehow undermined the holding of these four decisions. I do not read the Harris case in that manner. The Harris case started out with the proposition that's conceded by everybody here, and that is that a state that participates in the Medicaid program is not obligated under title 19 to continue to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment.

The court further found that the Hyde Amendment violated neither the Fifth Amendment nor the establishment clause of the First Amendment. In the course of doing that, the court cited with approval each of the four circuit decisions that I've talked about.

The court in Harris, I conclude, was assuming that funding was required for all abortions for which federal funding was available. And this conclusion is buttressed by the court's earlier admonition in Beal versus Stowe, where the court observed that serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage. So I think Harris versus McRay is perfectly consistent with the four decisions in question.

Now, the State also relies on an older Tenth Circuit decision, Doe versus Rose, which actually was handed down before there ever was any version of the Hyde Amendment. The defendant argues that the Tenth Circuit held in Doe versus Rose, that federal Medicaid statutes do not require the states to fund any abortions at all.

The reliance evidently is on dicta in Rose, in which the Court states, "The court lacks specific guidance as to whether Congress intended that abortions be covered by Medicaid and if so, more critically which abortions were to be covered by Medicaid benefits." And then the court went on to invalidate all abortion funding restrictions on constitutional grounds. So in a sense, the Rose case is actually broader than what I'm being asked to do here, much broader.

The Hyde Amendment, series of amendments to -- riders to appropriation bills which started I think in 1976 or '77, as I recall, obviate any uncertainty that the Tenth Circuit may have had in 1974. And I simply cannot read the Tenth Circuit dicta as a prohibition on the use of state funds to finance any abortions at all.

So I'm not persuaded that the Rose case is inconsistent with

the result that I've arrived at and with the result of four other circuit courts.

The next issue is the relief requested, and a sub-issue there is whether it is possible to sever one part of the constitutional amendment from other parts of the constitutional amendment. I do not conclude that this is a case where the constitutional amendment contains several parts so that we can sever one part of the amendment out, the offending part, and allow the rest to stand. The amendment as a whole would have to be redrafted in order to comply with federal law. And I do not understand how, as defendant suggests, that it could be read to comply with federal law by giving it the fullest effect possible.

I'm persuaded by the Third Circuit's position that the amendment here would -- that redrafting the amendment by a federal court would be improper for several reasons. First of all, there's an issue as to whether the State officials and/or the People of the State of Colorado would continue in the Medicaid program at all if the Hyde Amendment were enforced. I think the people and the defendant here and the other officials of the State of Colorado responsible for administering the program should be given the opportunity to decide whether they wish to continue to receive federal funds under the Medicaid Act. That was the reason that I asked counsel the question about the proper relief in this case.

The second reason for refusing to redraft the amendment in the one that was expressed by the Third Circuit. I just simply don't think it's a proper function of a federal district court to engage in drafting state constitutional amendments or state statutory provisions.

So the remedy here is to enjoin some action, and as I said earlier, I think that the proper remedy is to issue a permanent injunction enjoining the defendant from enforcing Article 5, Section 50 of the Colorado Constitution, and Section 26-4-105.5 and 26-4-512 of the Colorado Revised Statutes, and Rule 8.733 in the Colorado Code of Regulations, Title 10, section 2505.10, and

the Colorado State Medicaid Plan until, or so long as, I should say, the state is accepting monies from the federal government under Title 19 of the Social Security Act, commonly known as the Medicaid Act.

So that will be the order of the Court. The plaintiff's motion for summary judgment is granted. The defendant's motion to dismiss is denied.

Anything further?

MS. KOLBERT: No, Your Honor. Thank you.

THE COURT: Mr. Livingston?

MR. LIVINGSTON: Thank you, Your Honor. Two matters very briefly; one is we would ask that the injunction also contain the proviso that that injunction is also only in force as long as the Hyde Amendment, current version of the Hyde Amendment, or something similar, is in effect. I mean, obviously, if Congress decides to change the Hyde Amendment next October, then there would be no necessity for us to fund those abortions and not receive the federal Medicaid funds.

THE COURT: Well, Congress can do whatever it wants to in any case with a court injunction. Why should I do that?

MR. LIVINGSTON: Well, it's an--

THE COURT: I mean, if Congress changes the law, then I'll decide under the new law.

MR. LIVINGSTON: Thank you, Your Honor. That's all I wanted to clarify.

The other point, Your Honor, is that I will be as candid with the Court as I possibly can be. I think that as the Court said, the People of the State of Colorado are now faced with the choice of whether they choose to participate in the Medicaid program or

not, and that will take some time to do in order to propose a constitutional amendment and to put that before the people. I can state for the record that in this case, the defendants feels they have no choice but to seek appellate review in this case, and we would ask for a stay of the Court's injunction pending the appeal.

THE COURT: What's the plaintiff's position?

MS. KOLBERT: Your Honor, the testimony today was significant as to the harms of women that would ensue should this constitutional amendment be enforced. The harm to the state pending review is just the contrary, that is, it's a question of financing, it is a question of state money, a very, very small percentage of state money. In fact, the federal government will pay half of what they're being obligated to pay beginning today. And, in fact, may, given the testimony today, save the state dollars by continuing to permit abortions, because they will eliminate the obligation of paying for pregnancies that are carried to term as a result of that funding policy.

Your Honor, we would oppose any effort for a stay pending appeal. We certainly -- the state is free to seek expedited review as they may so choose, but we think the order of this Court must remain to protect rape and incest victims pending that appellate review.

MR. LIVINGSTON: May I respond just very briefly, Your Honor?

THE COURT: All right, yes.

MR. LIVINGSTON: I think -- I do want to be very practical here. I don't think the defendant has the authority under the Colorado Constitution to pay for these abortions. She does have the authority to withdraw from the Medicaid program. If that is the result of the Court's ruling today, the damage to the State of Colorado will be the loss of approximately $500 million annually in federal funds, provide medical services to poor, indigent and disabled people in the State of Colorado.

I don't want to be an alarmist, but I think that is the result of the Court's ruling today.

THE COURT: Wait a minute. Run that one by me again.

MR. LIVINGSTON: The defendant, Karen Beye, has to abide by the State Constitution, and she can do so by withdrawing from the Medicaid program.

THE COURT: Well, she has to abide by federal law.

MR. LIVINGSTON: And as this Court has ordered, she has the choice of withdrawing from Medicaid or paying for these abortions.

THE COURT: Well, if she wants to take the responsibility of withdrawing from the Medicaid program, I can't do much about it.

MR. LIVINGSTON: I appreciate the Court's position. What I'm trying to say is she will have no choice either and she will have to withdraw.

THE COURT: All right, I've heard enough argument. The motion for stay is denied. The testimony here concerning the injury which will occur to pregnant women who are pregnant as a result of rape or incest, although most of the testimony relates to rape, is compelling to the effect that it endangers their health, in some cases, it endangers their life, and I do not weigh that very lightly in the balance, even the balance as you've articulated it, Mr. Livingston.

So if you want your stay and the appellate court will give you a stay, that's where you're going to have to go.

Anything further?

MR. LIVINGSTON: Nothing further, Your Honor.

THE COURT: Court's in recess.

(Whereupon, the requested portion of the proceedings was concluded.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

May 9, 1994

Mary C. Chevalier
Federal Reporting Service, Inc.
17454 E. Asbury Place
Aurora, Colorado 80013
(303)-751-2777

Letter from Sally K. Richardson, Director, Medicaid Bureau, Health Care Financing Administration, United States Department of Health and Human Services to State Medicaid Directors

December 28, 1993

Dear State Medicaid Director:

The purpose of this letter is to notify you about a recent Congressionally enacted revision to the "Hyde Amendment" which affects the Medicaid program and to tell you how this revision in the law is to be implemented.

Effective October 1, 1993, as part of P.L. 103-112, the Health and Human Services Appropriation bill, Congress passed a revision of the Hyde Amendment pertaining to Federal funding of abortions under the Medicaid program. As enacted, the provision states:

> None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.

Thus, Federal funding (FFP) is now available for abortions performed to save the life of the mother or to terminate pregnancies resulting from rape or incest when the claim for such an abortion is paid by the State on or after October 1, 1993. Please note that it is the date that the State pays the claim and not the date of the service which determines the availability of FFP.

In order to implement this provision of the law, we are requesting that beginning with the first Quarterly Expenditure Report (HCFA-64) for fiscal year (FY) 1994 in January, States submit to the Health Care Financing Administration (HCFA) regional office (RO) a form certifying the number of abortions performed to save

the life of the mother, the number performed for a pregnancy resulting from an act of rape, and the number performed for a pregnancy resulting from an act of incest. This certification should be submitted to the RO on a quarterly basis with the completed HCFA-64.

Current regulations at 42 CFR 441.203 and 441.206 require that before FFP can be made available, the State must obtain a signed physician's certification that, based on the professional judgment of the physician, the abortion was necessary because "the life of the mother would be endangered if the fetus were carried to term." Because the language of the current Hyde Amendment differs somewhat from its predecessors, the State must change the wording of the physician's certification to comport with the current statutory language. With regard to this portion of the Hyde Amendment, the new legislative language, "to save the life of the mother," has essentially the same meaning as the previous legislation.

As with all other mandatory medical services for which Federal funding is available, States are required to cover abortions that are medically necessary. By definition, abortions that are necessary to save the life of the mother are medically necessary. In addition, Congress this year added abortions for pregnancies resulting from rape and incest to the category of medically necessary abortions for which funding is provided. Based on the language of this year's Hyde Amendment and on the history of Congressional debate about the circumstances of victims of rape and incest, we believe that this change in the text of the Hyde Amendment signifies Congressional intent that abortions of pregnancies resulting from rape or incest are medically necessary in light of both medical and psychological health factors. Therefore, abortions resulting from rape or incest should be considered to fall within the scope of services that are medically necessary.

The definition of rape and incest should be determined in accordance with each State's own law. States may impose reasonable reporting or documentation requirements on recipients

or providers, as may be necessary to assure themselves that an abortion was for the purpose of terminating a pregnancy caused by an act of rape or incest. States may not impose reporting or documentation requirements that deny or impede coverage for abortions where pregnancies resulted from rape or incest. To insure that reporting requirements do not prevent or impede coverage for covered abortions, any such reporting requirement must be waived and the procedure considered to be reimbursable if the treating physician certifies that in his or her professional opinion, the patient was unable, for physical or psychological reasons, to comply with the requirement.

State which have State Plan language more restrictive than that provided for under the revised Hyde Amendment may qualify for Federal funding for the first quarter of FY 94 if they submit approvable State Plan language changes by December 31, 1993.

By March 31, 1994, all States must ensure that their State Plans do not contain language that precludes FFP for abortions that are performed to save the life of the mother or to terminate pregnancies result from rape or incest.

As you know, it is necessary for States to adhere to all conditions for Federal Medicaid funding. As part of its ongoing State assessment and audit programs, HCFA may include reviews of abortion claims, if necessary, to assure compliance with these conditions.

Please call my office if you have any questions about this matter.

Sincerely yours,
/s/ SALLY K. RICHARDSON
Sally K. Richardson
Director
Medicaid Bureau

cc: All Regional Administrators